

EXHIBIT H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VLADI ZAKINOV, et al.,
Plaintiffs,
v.
RIPPLE LABS, INC., et
al.,
Defendant

Case No. 18-cv-06753-PJH

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 70

Defendant Ripple Labs, Inc.’s (“defendant Ripple”), defendant XRP II, LLC’s (“defendant XRP II”), and defendant Ripple’s Chief Executive Officer, Bradley Garlinghouse (“defendant Garlinghouse”) (collectively, “defendants”) motion to dismiss plaintiff Vladi Zakinov’s (“plaintiff”) consolidated class action complaint came on for hearing before this court on January 15, 2020. Plaintiff appeared through his counsel, James Taylor-Copeland and Oleg Elkhunovich. Defendants appeared through their counsel, Damien Marshall, Kathleen Hartnett, and Menno Goedman. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby **GRANTS IN PART** and **DENIES IN PART** defendants’ motion for the following reasons.

BACKGROUND

This consolidated putative class action (“In re Ripple”) arises out of the creation, dispersal, circulation, and sale of “XRP,” a sort of digital units often referred to as a “cryptocurrency.” In re Ripple comprises various actions alleging both violations of federal and California state securities laws. Such actions include Coffey v. Ripple et al., 18-3286, Greenwald v. Ripple et al., 18-4790, Zakinov v. Ripple et al., 18-CIV-2845 (Cal.

1 Super. Ct. San Mateo Cty.), and Oconer v. Ripple Labs, Inc., 18-CIV-3332 (Cal. Super.
2 Ct. San Mateo Cty.). The procedural posture of this action is complex and its
3 restatement here is largely unnecessary. The court need note only that this action is the
4 only ongoing matter of those referenced above. For more information, the court directs
5 readers to its February 28, 2019 order denying remand. Dkt. 33.

6 On August 5, 2019, plaintiff filed the operative consolidated complaint against
7 defendants. In it, plaintiff alleges the following claims:

- 8 1. Violation of Section 12(a)(1) of the Securities Act (Title 15 U.S.C. §
9 77l(a)(1)) against defendants for the unregistered offer and sale of
10 securities. Compl. ¶¶ 169-175;
- 11 2. Violation of Section 15 of the Securities Act (Title 15 U.S.C. § 77o) against
12 defendant Ripple and defendant Garlinghouse for control person liability for
13 the primary violation of Title 15 U.S.C. § 77l(a)(1). Id. ¶¶ 176-183 (together
14 with U.S.C. § 77l(a)(1), the “federal securities claims”);
- 15 3. Violation of California Corporations Code § 25503 against defendants for a
16 primary violation of § 25110’s restriction on the offer or sale of unregistered
17 securities. Id. ¶¶ 184-190.
- 18 4. Violation of California Corporations Code § 25504 against defendant Ripple
19 and defendant Garlinghouse for control person liability in connection with
20 defendants’ primary violation of § 25110. Id. ¶¶ 201-207;
- 21 5. Violation of California Corporations Code § 25501 against defendant Ripple
22 and defendant XRP II, as well as a parallel material assistance claim under
23 § 25504.1 against defendant Ripple and defendant Garlinghouse, for
24 misleading statements in connection with the offer or sale of securities in
25 violation of § 25401. Id. ¶¶ 191-200;
- 26 6. Violation of California Business & Professions Code § 17500 against
27 defendants for misleading advertisements concerning XRP. Id. ¶¶ 208-212;
- 28 7. Violation of California Business & Professions Code § 17200 against

1 defendants for their unregistered offer or sale of securities in violation of
2 federal and state law, false advertising practices, misleading statements,
3 and offense to established public policy. *Id.* ¶¶ 212-222.

4 Defendants filed the instant motion to dismiss for failure to state a claim under
5 Rule 12(b)(6). Dkt. 70. At the core of plaintiff's claims is that XRP qualifies as a security
6 under California state and federal law. While plaintiff alleges this legal theory at length in
7 his complaint, Compl. ¶¶ 121-159, defendants save their dispute with that theory for
8 another day and assume—solely for the instant motion—plaintiff's legal position that XRP
9 qualifies as a security. Dkt. 70 at 11; Dkt. 74 at 9; Dkt. 75 at 7 n.1. Instead, defendants
10 challenge the complaint on grounds of Title 15 U.S.C. § 77m's three-year statute of
11 repose and traditional Rule 12(b)(6) failure to state a claim grounds. Below, the court
12 provides a summary of the relevant allegations and judicially noticeable facts.

13 **A. The Court Partially Grants Defendants' Unopposed Requests for Judicial
14 Notice**

15 As an initial matter, defendants request that the court take judicial notice of the
16 following documents:

- 17 • The Statement of Facts from the federal government's May 2015 settlement
18 with defendants Ripple Labs and defendant Ripple XRP II (predecessor to
19 defendant XRP II, LLC). Dkt. 70-3. This document is cited or referenced in
20 the complaint at paragraphs 2 n.2, 25, and 112.
- 21 • The "Ripple Credits" page from defendant Ripple's Wiki website. Dkt. 70-4.
22 This document is cited or referenced in the complaint at paragraphs 24 n.7,
23 130 n.91, and 145 n.99.
- 24 • A Quarter One 2018 XRP Markets Report. Dkt. 70-5. This document is
25 cited at complaint paragraph 36 n.16.
- 26 • An article titled "Ripple is sitting on close to \$80 billion and could cash out
27 hundreds of millions per month—but it isn't." Dkt. 70-6. This document is
28 cited at complaint paragraph 52 n.31.

1 Here, the court need not consider the fourth request for judicial notice (Dkt. 70-6)
2 to resolve defendants' motion. As a result, the court denies that request. Otherwise,
3 because plaintiff does not oppose the remaining requests and their underlying documents
4 are sufficiently cited at the complaint sections noted immediately above, the court grants
5 defendants' request for judicial notice of those three documents and will incorporate their
6 contents by reference in its analysis below.

7 **B. The Parties**

8 **1. Defendant Ripple**

9 Defendant Ripple is a Delaware corporation with its principal place of business in
10 San Francisco. Compl. ¶ 14. While defendant Ripple sells certain enterprise software
11 products, the primary source of its income is the sale of XRP. Id. ¶ 28.

12 **2. Defendant XRP II**

13 Defendant XRP II is a New York limited liability company with its principal place of
14 business in San Francisco. Id. ¶ 15. Defendant XRP II's predecessor is XRP Fund II,
15 LLC, which was incorporated in South Carolina on July 1, 2013. Dkt. 70-3 ¶ 22.
16 Defendant XRP II was created to "engage in the sale and transfer of" XRP to "various
17 third parties on a wholesale basis." Id.

18 **3. Defendant Garlinghouse**

19 Defendant Garlinghouse is the Chief Executive Officer of defendant Ripple.
20 Defendant Garlinghouse has held that position since January 2017. Compl. ¶ 16.
21 Previously, Garlinghouse served as Ripple's Chief Operating Officer from April 2015
22 through December 2016. Id.

23 **4. Plaintiff**

24 On June 21, 2019, the court appointed Bradley Sostack as lead plaintiff. Dkt. 60.
25 Plaintiff is a Florida resident. Id. ¶ 13. Between January 1, 2018 and January 16, 2018,
26 plaintiff purchased roughly 129,000 units of XRP for approximately \$307,700 in other
27 cryptocurrencies. Id. Plaintiff alleges that he purchased such XRP "from defendants," id.
28 ¶¶ 172, 187, although he does not specify whether he made such purchase directly from

1 defendants or incidentally on a cryptocurrency exchange. Plaintiff sold his XRP between
 2 January 9, 2018 and January 17, 2018 for \$189,600 in other cryptocurrency, representing
 3 a \$118,100 loss in XRP value. Id. ¶ 163. Plaintiff seeks to certify a Rule 23(b)(3) class
 4 that generally includes all persons or entities who purchased XRP. Id. ¶ 160.

5 **C. Relevant Allegations**

6 In 2013, defendant Ripple generated 100 billion units of XRP. Compl. ¶ 2.
 7 Following their creation, defendant Ripple gave 20 billion XRP to its founders and
 8 retained the remaining 80 billion XRP. Id. ¶¶ 2, 22, 23.

9 **1. XRP Escrow Program**

10 Since the XRP's creation, defendant Ripple has placed a substantial percentage of
 11 XRP that it owns in escrow and developed a plan for when and in what quantities XRP
 12 should be sold. Id. ¶ 5. As of May 2017, defendant Ripple maintained 62 billion XRP.
 13 Id. ¶ 84. At that time, defendant Ripple stated that it would place 55 billion XRP in a
 14 secured escrow account and would only offer and sell limited amounts of XRP at defined
 15 intervals. Id. In an article, defendant Garlinghouse publicly stated that "[o]ur goal in
 16 distributing XRP is to incentivize actions that build trust, utility, and liquidity." Id. ¶ 86. In
 17 that same publication, Garlinghouse subsequently characterized the XRP distribution as
 18 "ongoing." Id. Defendants adopted the escrow plan to allow investors "to mathematically
 19 verify the maximum supply of XRP that can enter the market." Id. ¶ 87.

20 **2. Alleged Offers or Sales of XRP by Defendants**

21 **a. Sales Acknowledged in Defendants' May 2015 Settlement
 22 Agreement**

23 In May 2015, defendant Ripple and defendant XRP II entered a settlement
 24 agreement with the United States Attorney's Office for the Northern District of California
 25 ("USAO") for violation of the Bank Secrecy Act, Title 31 U.S.C § 5330. Id. ¶ 25; Dkt. 70-
 26 3. Significantly, plaintiff alleges that, as part of that agreement, defendants
 27 "acknowledged that they sold XRP to the **general public**." Compl. ¶ 25 (emphasis
 28 added). The parties' characterization of the agreement aside, its statement of facts and

1 violations section identifies the following XRP sale-related conduct by defendants since
2 2013:

- 3 • As of the date of the agreement, defendant Ripple “facilitated transfers of
4 virtual currency and provided virtual currency exchange transaction
5 services.” Dkt. 70-3 ¶ 2.
- 6 • “From at least March 6, 2013, through April 29, 2013, Ripple Labs sold
7 convertible virtual currency known as ‘XRP.’” Id. ¶ 17.
- 8 • “Throughout the month of April 2013, Ripple Labs effectuated multiple sales
9 of XRP currency totaling over approximately \$1.3 million U.S. dollars.” Id. ¶
10 20.
- 11 • “By on [sic] or about August 4, 2013, XRP II was engaged in the sale of
12 XRP currency to third-party entities.” Id. ¶ 23.
- 13 • Prior to September 26, 2013, defendant XRP II had “engag[ed] in numerous
14 sales of virtual currency to third parties.” Id. ¶ 26(a).
- 15 • On September 30, 2013, defendant XRP II “negotiated an approximately
16 \$250,000 transaction . . . for a sale of XRP virtual currency with a third-party
17 individual.” Id. ¶ 28(a).
- 18 • In November 2013, defendant XRP II considered and rejected a roughly
19 \$32,000 transaction. Id. ¶ 28(b).
- 20 • In January 2014, defendant XRP II considered and rejected an offer from
21 foreign-based customer who sought to purchase XRP. Id. ¶ 28(c).

22 Lastly, as part of the settlement, defendant XRP II is described as “created to
23 engage in the sale and transfer of the convertible virtual currency, XRP, to various third
24 parties **on a wholesale basis.**” Id. ¶ 22 (emphasis added).

25 **b. Pre-2017 XRP Sales and Circulation Rates**

26 On or before July 12, 2014, defendant Ripple stated on its website that it “sells
27 XRP to fund its operations and promote the network.” Compl. ¶ 24; Dkt. 70-4 at 4
28 (webpage “last modified” on “12 July 2014”). Between December 2014 and July 2015,

1 defendant Ripple also disclosed the amount of XRP that it held and that in circulation.
 2 Compl. ¶ 26. As of June 30, 2015, defendant Ripple held approximately 67.5 billion XRP.
 3 Id. Of the remaining 32.5 billion XRP in circulation, 20 billion was held by defendants'
 4 founders and some other undisclosed amount was used for "business development
 5 agreements." Id.

6 In 2016, defendant Ripple promised but did not execute an agreement with a third-
 7 party vendor an option to purchase 5 billion XRP in exchange for access to the vendor's
 8 consortium of financial institutions. Id. ¶ 104. Aside from this potential transaction,
 9 neither plaintiff nor defendants alleged or proffered any judicially noticeable fact showing
 10 any other specific instances of XRP sales between December 2014 and 2016.

11 c. **Defendants' Increase Their XRP Sales to the Public in 2017**

12 Defendants sell XRP to retail consumers in exchange for legal tender or other
 13 cryptocurrencies. Id. ¶ 4. Defendants also sell XRP "wholesale to larger investors" as
 14 well as "significant quantities of XRP directly to the general public on cryptocurrency
 15 exchanges." Id. ¶¶ 30, 127, 156. The earliest indication of XRP's listing on an exchange
 16 that plaintiff alleges is May 18, 2017. Id. ¶ 44.

17 Significant to the instant motion, in 2017 and early 2018, defendants rapidly
 18 accelerated their sale of XRP to the public. Id. ¶ 30. During that period, Ripple increased
 19 its efforts to engage in distribution strategies aimed at the general public that would result
 20 in stabilizing or strengthening XRP exchange rates against other currencies. Id. ¶ 5.
 21 Since 2017, defendants have "earned over \$1.1 billion through the sale of XRP." Id. ¶
 22 30.

23 Plaintiff alleges that defendants, primarily through defendant XRP II, sold the
 24 following amounts of XRP per quarter:

25 Annual Quarter	26 Amount Allegedly Sold (in USD)
27 Q2 2017	\$31 million
28 Q3 2017	\$52 million
Q4 2017	\$91 million

1	Q1 2018	\$167 million
2	Q2 2018	\$154 million
3	Q3 2018	\$81 million
4	Q4 2018	\$129 million
5	Q1 2019	\$169 million
6	Q2 2019	\$251 million

7 Id. ¶¶ 31-39.

8 Plaintiff alleges that such sales occurred through some combination of direct,
 9 exchange, institutional, or programmatic sales. Id. As of August 5, 2019, defendant has
 10 not registered XRP with the Securities and Exchange Commission (“SEC”) or qualified it
 11 with the California Commissioner of Corporations. Id. ¶ 12.

12 **3. Public Access to XRP**

13 Defendant Ripple’s website provides advice on “How to Buy XRP” and includes
 14 hyperlinks to exchanges trading XRP. Id. ¶¶ 4, 43, 135. In 2017, defendant Ripple, as
 15 well as its various officers, published tweets concerning or including hyperlinks to such
 16 exchanges. Id. ¶¶ 44-45. As of December 21, 2017, XRP was available for purchase or
 17 sale at over 50 exchanges. Id. ¶¶ 45, 128.

18 **4. Alleged Misstatements concerning XRP**

19 Plaintiff alleges numerous purported misstatements by defendants concerning
 20 XRP, its value, and its status as a non-security. Id. ¶¶ 42-83, 95-97. The court details
 21 those misstatements in its analysis below.

22 **DISCUSSION**

23 **A. Legal Standard**

24 **1. Rule 12(b)(6)**

25 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
 26 alleged in the complaint. Ileto v. Glock, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Rule 8
 27 requires that a complaint include a “short and plain statement of the claim showing that
 28 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), dismissal “is

proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory.” Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 558-59 (2007).

As a general matter, the court should limit its Rule 12(b)(6) analysis to the contents of the complaint, although it may consider documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff’s pleading.” Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007) (“a court can consider a document on which the complaint relies if the document is central to the plaintiff’s claim, and no party questions the authenticity of the document”). The court may also consider matters that are properly the subject of judicial notice, Lee v. City of L.A., 250 F.3d 668, 688–89 (9th Cir. 2001), exhibits attached to the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents referenced extensively in the complaint and documents that form the basis of the plaintiff’s claims, No. 84 Emp’r-Teamster Jt. Counsel Pension Tr. Fund v. Am. W. Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

Lastly, a district court “should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations,” however, dismissal without such leave “is proper if it is clear that the complaint could not be saved by amendment.” Somers, 729 F.3d at 960.

2. Rule 9(b)

For actions alleging fraud, “a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. Pro. 9(b). To satisfy Rule 9(b), a plaintiff must allege “the ‘time, place, and specific content of the false representations as well as

1 the identities of the parties to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d
 2 756, 764 (9th Cir. 2007). “Averments of fraud must be accompanied by ‘the who, what,
 3 when, where, and how’ of the misconduct charged,” and “a plaintiff must set forth *more*
 4 than the neutral facts necessary to identify the transaction. The plaintiff must set forth
 5 what is false or misleading about a statement, and why it is false.” Vess v. Ciba-Geigy
 6 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (emphasis in the original). Plaintiff’s
 7 allegations of fraud “must be specific enough to give defendants notice of the particular
 8 misconduct which is alleged to constitute the fraud charged so that they can defend
 9 against the charge and not just deny that they have done anything wrong.” Swartz, 476
 10 F.3d at 764.

11 **B. Analysis**

12 **1. Plaintiff’s Claims under the Federal Securities Laws Are Not Barred by**
 13 **the Statute of Repose**

14 Here, whether Title 15 U.S.C § 77(m)’s three-year statute of repose bars plaintiff’s
 15 federal securities law claims depends upon two distinct issues: (1) the controlling rule for
 16 measuring when the statute of repose commences for purpose of Title 15 U.S.C §
 17 77l(a)(1); and (2) when the alleged (or judicially noticeable) sales of XRP first qualified as
 18 a “bona fide” public offering within the meaning of Title 15 U.S.C. § 77l(a)(1).

19 The court analyzes each issue in turn.

20 **a. The First Offered Rule Articulated by the Second Circuit in Stolz**
 21 **Family Controls**

22 Title 15 U.S.C § 77m provides the following in relevant part:

23 “No action shall be maintained to enforce any liability created
 24 under section 77k or 77l(a)(2) of this title unless brought within
 25 one year after the discovery of the untrue statement or the
 26 omission, or after such discovery should have been made by
 27 the exercise of reasonable diligence, or, if the action is to
 28 enforce a liability created under section 77l(a)(1) of this title,
 unless brought within one year after the violation upon which it
 is based. ***In no event shall any such action be brought to***
enforce a liability created under section 77k or 77l(a)(1) of
this title more than three years after the security was bona
fide offered to the public, or under section 77l(a)(2) of this title

more than three years after the sale.” 15 U.S.C. § 77m (emphasis added).

Defendants argue that the statute of repose’s commencement is controlled by the so-called “first-offered” rule articulated by the Second Circuit in Stolz Family Partnership L.P. v. Daum, 355 F.3d 92 (2d Cir. 2004) (“Stolz”). Under that rule, “the three-year period begins when the security is ***first*** bona fide offered.” Stolz, 355 F.3d at 100 (italics in the original) (bold added).

In his briefing, plaintiff primarily argues that when the statute of repose commences is controlled by the so-called “last-offered” rule stated by the district court In re Bestline Products Securities and Antitrust Litigation, 1974 WL 386 (S.D. Fla. 1975) and subsequently adopted by a court in this district in Hudson v. Capital Mgmt. Int'l, Inc., 1982 WL 1384 (N.D. Cal. Jan. 6, 1982). Under that rule, the three-year period begins “on the date the alleged security was last offered to the public.” In re Bestline, 1975 WL 386 at *2. Explained below, the court adopts the first-offered rule as controlling here.¹

In Stolz, the Second Circuit considered two federal securities claims against a defunct company, one of which was a claim for sale of unregistered securities (labeled “membership units”) under § 77l(a)(1). 355 F.3d at 95. Plaintiff filed his initial complaint in February 2001 and his operative pleading on November 19, 2001. Id. In it, plaintiff alleged that “beginning in or about July, 1997 [sic] and continuously through the bankruptcy filing . . . [defendant] engaged in a ‘public offering.’” Id. The district court held that plaintiff’s original complaint was filed “more than three years after the membership interests were ‘bona fide offered to the public’” and the claim was therefore time barred under § 77m. Id. at 96.

On appeal, the Second Circuit focused its analysis on the core legal question

¹ At oral argument, plaintiff’s counsel effectively abandoned the argument that the last-offered rule controls. Instead, counsel only briefly mentioned Hudson as “the only in district decision” and then went on at length to discuss Stolz “if the court was to find the reasoning of the Second Circuit in Stolz persuasive.” Despite plaintiff’s apparent concession, because of the significance of selecting the proper doctrine to dispose of defendants’ statute of repose challenge in this motion and to guide the parties in this litigation going forward, the court will explain its decision to choose and apply the first-offered rule here.

here—namely, “at what point during the bona fide offer does the repose period begin?” 355 F.3d at 98-99. While the Second Circuit advanced several reasons in support of its determination that the statute of repose is triggered by a defendant’s *first* bona fide offer to the public of its allegedly unregistered securities—including the weight of precedent, statutory interpretation, historical function of statutes of repose, and policy considerations, 355 F.3d at 100-107—the court finds Stoltz’s statutory construction justification most persuasive.

Significantly, § 77m includes both a three-year statute of repose and a one year-statute of limitations for claims brought under § 77l(a)(1). If the court were to interpret the statute of repose to commence at the time of the last bona fide public offer, such interpretation would effectively nullify its effect because “every potential plaintiff purchasing a defendant’s security during an offering period would have at least three years before being constrained by the repose period, since each day during which the offer continued would delay the start of the repose period. Therefore, the statute would fail to enforce final repose with respect to any plaintiff, with one exception—a plaintiff whose one-year limitations period was tolled not only for the duration of the offer, but for the three years subsequent to the end of the offering period.” P. Stoltz, 355 F.3d at 105 n.9. Stated differently, under the last-offered rule, the statute of repose would generally bar a § 77l(a)(1) claim *only if* such claim fell within a tolling exception to § 77m’s one-year statute of limitations. Absent such an exception, the one-year statute of limitation would bar the § 77l(a)(1) claim two years before the statute of repose could take effect. Plaintiff failed to explain how the last-offered rule would not result in such an eviscerating effect upon the statute of repose, and the court does not see a way to adopt such construction without rendering the statute of repose “surplusage.” Stoltz, 355 F.3d at 105 n.9. Given such inability, the court concludes that the only reasonable way to construe the statute of repose is by adopting the first-offered construction.

Separately, the court further finds that the authorities urged by plaintiff here in support of the last-offered rule are unpersuasive. Significantly, as the Second Circuit

1 correctly noted, Hudson stems from In re Bestline and itself offers no analytical
 2 justification for adopting last-offered rule.² To support its articulation of the last-offered
 3 rule, the court in In re Bestline provides only the following:

4 “The defendants' interpretation of the statute [arguing the first-
 5 offered approach] is simply at odds with the remedial purposes
 6 of the Securities Act of 1933. To hold as the defendants
 7 suggest would be to give individuals a license to sell
 8 unregistered securities to whomsoever they wished if they first
 9 offered the security to a group of people and, so to speak, ‘ran
 10 the gauntlet’ for three years. It is doubtful that Congress
 11 intended the 1933 Act’s goals of registration, disclosure, and
 12 private enforcement to be so easily frustrated. As a result, the
 13 defendants' interpretation of [Title 15 U.S.C. § 77(m)] must be
 14 rejected in favor of the plaintiffs' interpretation, according to
 15 which the limitations period began on the date the alleged
 16 ‘security’ was last offered to the public.” Stolz, 355 F.3d at 102
 17 citing In re Bestline, 1975 WL 386 at *2.

18 While the court appreciates the policy concern identified above, such a concern
 19 does not overcome the statutory interpretation-based justification articulated by Stolz in
 20 support of the first-offered rule. Moreover, as the Second Circuit correctly noted, a
 21 statute of repose is a creature of legislative supremacy that operates independent of
 22 equitable concerns. Stolz, 355 F.3d at 102-03 (“[A] statute of repose begins to run
 23 without interruption once the necessary triggering event has occurred, even if equitable
 24 considerations would warrant tolling or even if the plaintiff has not yet, or could not yet
 25 have, discovered that she has a cause of action.”) (internal citations omitted). By making
 26 § 77m’s statute of repose applicable to § 77l(a)(1) claims, Congress decided to limit the
 27 availability of such statutory claims. Such decision is contrary to In re Bestline’s doubt
 28 about congressional intent and assertion that the first-offered rule would improperly
 undermine § 77l(a)(1)’s remedial purposes.

29 Further, when articulating the last-offered rule, the court in In re Bestline
 30 incorrectly characterized § 77m’s three-year statute of repose as a “statute of limitations.”
 31 In re Bestline, 1975 WL 386, at *1 (“One of the more hotly contested issues is whether

2 ² Hudson, 1982 WL 1384, at *3 n. 3 (“The relevant offering is the last offering of the
 security [citing In re Bestline] . . . That date should be pled.”).

1 the claims of the plaintiff class under section 12(1) of the Securities Act of 1933 are
 2 barred by the Statute of Limitations contained in section 13 of the Act. In pertinent part,
 3 section 13 reads: No action shall be maintained to enforce any liability created under . . .
 4 section 12(1), unless it is brought within one year after the violation upon which it is
 5 based. In no event shall any such action be brought to enforce a liability created under . . .
 6 . section 12(1) *more than three years after the security was bona fide offered to the*
 7 *public. . .* The defendants take the position that ***the underscored language*** should be
 8 interpreted to mean that an action under section 12(1) may not be brought more than
 9 three years after the security was *first offered to the public.*") (italics in the original) (bold
 10 italics added). As explained in Stolz, Congress recognizes a significant distinction
 11 between the function of a statute of repose and a statute of limitation.³ Because the court
 12 in In re Bestline incorrectly characterized § 77m's statute of repose as a statute of
 13 limitations, it appears to have failed to account for the absolute nature of the three-year
 14 statute of repose when advancing its "remedial purposes" policy critique. Given this
 15 shortcoming, too, the court rejects the last-offered rule.

16 Lastly, plaintiff cites the Supreme Court in Cal. Public Employees' Retirement Sys.
 17 v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017) for the proposition that § 77m's statute of
 18 repose "runs from the defendants' last culpable act (the offering of the securities) . . ." Id.
 19 at 2049. This citation fails to provide any guidance on the critical issue here: namely,
 20 whether the subject offering means first- or last-bona fide offering. Further, the Supreme
 21 Court in ANZ Securities did not consider the application of § 77m's statute of repose to
 22 an unregistered securities claim under § 77l(a). Instead, it considered the applicability of
 23 that section to a subsequent suit alleging a misrepresentation claim initiated by a plaintiff

24
 25 ³ Stolz, 355 F.3d at 102 ("Statutes of limitations bear on the availability of remedies and,
 26 as such, are subject to equitable defenses . . . the various forms of tolling, and the
 27 potential application of the discovery rule. In contrast, statutes of repose affect the
 28 availability of the underlying right: That right is no longer available on the expiration of the
 specified period of time. In theory, at least, the legislative bar to subsequent action is
 absolute, subject to legislatively created exceptions . . . set forth in the statute of
 repose.") citing Calvin W. Corman, Limitation of Actions, § 1.1, 4-5 (1991).

1 who was previously a member of a putative class action brought within the period of
2 repose. 137 S. Ct. at 2047. If the Supreme Court sought to reject the first-offered rule—
3 much less overrule a “vast majority” of lower court’s adopting the first-offered rule, Stolz,
4 355 F.3d at 100—it would not have done so by vague reference in an inapposite case.

5 In short, in the absence of controlling Ninth Circuit or Supreme Court authority, the
6 court has discretion to choose the applicable rule for determining when § 77m's statute of
7 repose commences. Because the first-offered rule is better reasoned than its last-offered
8 counterpart, the court adopts it as controlling here.

9 **b. The First Offered Rule Does Not Bars Plaintiff's Federal**
10 **Securities Claims**

Having decided the controlling rule for determining when the statute of repose commences, the next issue is its application. Based on the allegations and judicially noticeable facts, the court concludes that defendants did not make their first bona fide public offering of XRP before August 5, 2016 (three years prior to plaintiff's filing of his federal securities claims in this action on August 5, 2019).

16 As a preliminary matter, defendants assert that “plaintiff must allege facts to show
17 compliance with Section 13 [Title 15 U.S.C. § 77m].” Dkt. 70 at 16. In support,
18 defendants cite Toombs v. Leone, 777 F.2d 465, 469 (9th Cir. 1985). Plaintiff responds
19 that the Ninth Circuit in Johnson v. Aljian, 490 F.3d 778 (9th Cir. 2007) “criticized”
20 Toombs, “observed” that a plaintiff does not need to allege facts that negate a potentially
21 applicable affirmative defense to survive an attack on the pleadings, and “urged” courts to
22 discard such a requirement. Dkt. 74 at 11 n.2. Defendants fail to address plaintiff’s
23 response in their reply. Both parties overstate their respective authority.

24 Plaintiff is correct that the Ninth Circuit in Johnson subsequently criticized Toombs
25 and urged disregarding its requirement. Johnson v. Aljian, 490 F.3d 778, 782 (9th Cir.
26 2007) (“We followed such general rule in Toombs v. Leone, 777 F.2d 465 (9th Cir.1985),
27 holding that ‘the plaintiff must affirmatively plead sufficient facts in his complaint to
28 demonstrate conformity with the statute of limitations’ if he is to make out a violation of

1 Section 12 of the Securities Act of 1933. . . . This rule has incurred forceful, and we think
 2 justified, criticism."). However, Johnson does not stand for the proposition that "it is not
 3 the plaintiff's burden to negate an affirmative defense on the pleadings." Rather,
 4 Johnson expressly recognized that Toombs' "disapproved pleading rule **may** survive in
 5 this circuit with respect to Section 12." 490 F.3d at 782 n.13 (emphasis added).

6 Contrary to defendants' suggestion, Toombs does not require that plaintiff allege
 7 facts showing compliance with § 77m's **statute of repose**. Instead, Toombs requires
 8 only that a plaintiff alleging a §77l claim must plead compliance with § 77m's **statute of**
 9 **limitations**. Toombs, 777 F.2d 465, 468 (9th Cir. 1985) ("In asserting a violation of
 10 Section 12, the plaintiff must affirmatively plead sufficient facts in his complaint to
 11 demonstrate conformity with the statute of limitations."). Defendants failed to offer any
 12 authority in support of extending Toombs's pleading requirement to the statute of repose.

13 Given the Ninth Circuit's more recent criticism of that requirement in Johnson, the
 14 court concludes that plaintiff need not affirmatively allege that his federal securities claims
 15 comply with the statute of repose. This conclusion is further supported by the general
 16 rule that a plaintiff need not anticipate or negate an affirmative defense in his or her
 17 pleadings. Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1987 (2017) ("In civil litigation,
 18 a release is an affirmative defense to a plaintiff's claim for relief, not something the
 19 plaintiff must anticipate and negate in her pleading."). The court now turns to whether
 20 plaintiff alleged sufficient facts showing a timely first bona fide public XRP offering.

21 In Stolz, the Second Circuit interpreted § 77m's "bona fide" public offering
 22 requirement to mean "when was the stock really and truly (genuinely) being offered to the
 23 public, as opposed to, say, a simulated offering." Id. at 99. The Second Circuit
 24 emphasized that the phrase "bona fide" qualified "public," rather than "first," offering to the
 25 public, id. citing Louis Loss & Joel Seligman, Securities Regulation § 2-B-6, n.285 (3d
 26 ed.1996), and passingly footnoted that courts may find a first bona fide offer based upon
 27 a defendant's "clear objective attempts to secure purchasers," id. at 104 n.7. Aside from
 28 the above, the Second Circuit offered no explanation about what sort of offers may

1 qualify as “bona fide” public offers and its application of the bona fide offer standard
2 provides no insight. 355 F.3d at 95, 106 (concluding that defendant “bona fide offered to
3 the public the security at issue . . . in July 1997” based upon the allegation “in paragraph
4 16 that beginning in or about July 1997 and continuously through the bankruptcy filing.”).

5 Here, based on plaintiff’s complaint and the judicially noticeable facts proffered,
6 the court cannot conclude that defendants’ first bona fide public offer to sell XRP
7 occurred before August 5, 2016. While defendants did acknowledge various 2013 offers
8 and sales in their May 2015 settlement with the USAO, the sales activity identified in that
9 settlement does not show that defendants targeted the general public when offering to
10 sell XRP. Instead, the activity identified in that agreement either shows that defendants
11 attempted or consummated particular transactions with specific third-party individuals or
12 entities, Dkt. 70-3 ¶¶ 23, 26(a), 28(a), 28(c), or generally refers to the existence of
13 defendants’ sales activity without defining the scope of the market for such sales, *id.* ¶¶
14 17, 20.

15 Similarly, the complaint’s reference to an unexecuted agreement between
16 defendants and a third-party vendor in 2016, Compl. ¶ 104, is no different than the
17 handful of person-specific transactions noted in defendants’ May 2015 settlement.
18 Moreover, the limited nature of defendants’ pre-settlement agreement sales activity is
19 further shown by the settlement’s description of defendant XRP II as “created to engage
20 in the sale and transfer of the convertible virtual currency, XRP, to various third parties
21 **on a wholesale basis.**” Dkt. 70-3 ¶ 22 (emphasis added).

22 At oral argument, defendants reiterated that plaintiff, by his own pleading, admitted
23 the public nature of their pre-2017 sales. To support that assertion, defendants cite
24 paragraph 25 of the complaint, which alleges that defendants “acknowledged that they
25 sold XRP to the general public,” Dkt. 70 at 17, and the heading to Section IV of the
26 complaint, which is titled “XRP Genesis and Public Offerings,” Dkt. 70 at 17. Plaintiff’s
27 counsel then fell on that sword, acknowledging that the term “general” in paragraph 25 is
28 mistaken and representing that the purpose of that paragraph was to summarize the

1 handful of transactions detailed in the May 2015 settlement.

2 While the court agrees with defendants that plaintiff's own apparently mistaken
3 characterization of defendants' pre-May 2015 sales activities as involving the "general
4 public" tend to belie his subsequent assertion that such activities did not qualify as a bona
5 fide public offering, the court finds that plaintiff's aberrational use of the terms "public
6 offering" and "general public" are the sort of conclusory labels that it need not accept as
7 true on a motion to dismiss. Heimrich v. Dep't of the Army, 947 F.3d 574, 577 (9th Cir.
8 2020) ("The complaint 'does not need detailed factual allegations,' but the plaintiff must
9 provide more than 'labels and conclusions' to withstand scrutiny under Rule 12(b)(6).").
10 Instead, the court examines the substance of the actual sales activity alleged and
11 judicially noticeable. Based on that examination, the court cannot conclude that
12 defendants made their first bona fide public offer before August 5, 2016.

13 Such conclusion is separately supported by the substantial volume of XRP sales
14 that allegedly occurred **after** August 5, 2016. Significantly, the first date alleged detailing
15 when defendants listed XRP on a cryptocurrency exchange is May 18, 2017. Compl. ¶
16 44. Around this same time, individuals purchased \$31 million worth of XRP, comprising
17 \$21 million in sales to "market participants" directly and \$10 million in exchange sales.
18 Id. ¶ 39. From 2017 Q2 onward, purchases by direct market participants, exchange
19 participants, programmatic participants, and institutions rose from tens of millions to over
20 \$250 million quarterly. Id. ¶¶ 31-39. Such volumes of sales are greater than the handful
21 of one-off multi-thousand-dollar transactions and \$1.3 million in monthly sales detailed in
22 the May 2015 settlement. Such a material change supports the inference that the
23 defendants did not make their first genuine attempt to sell to the public until 2017.

24 Lastly, at oral argument, defendants contended that the court could find a bona
25 fide public offer prior to the May 2015 settlement agreement based upon the fact that the
26 government investigated and prosecuted defendants for sales-related activities prior to
27 such agreement. Defendants failed to proffer any authority in support of such a
28 categorical position and, in any event, the May 2015 settlement agreement—which

1 **defendants** requested this court take judicial notice of—speaks for itself. Already
 2 discussed at length above, that agreement specifies only a handful of individualized
 3 transactions and does not describe the culpable sales activities as public in nature.

4 The court cautions that, once the parties have developed a factual record, it may
 5 revisit its determination on whether defendant made their first bona fide XRP offer to the
 6 public before or after August 5, 2016. However, based upon the allegations and judicially
 7 noticeable facts properly before this court on this motion, the court cannot find that such
 8 offer occurred outside the three-year statute of repose.⁴ As a result, the court concludes
 9 that § 77m does not bar plaintiff's federal securities claims at this juncture.⁵

10 **2. Plaintiff Adequately Alleged the Federal Securities Claim Against
 11 Defendants**

12 Title 15 U.S.C § 77l(a)(1) provides the following in relevant part:

13 "Any person who—

14 (1) offers or sells a security in violation of section 77e of this
 15 title, or

16 . . .

17 shall be liable, subject to subsection (b), to the person
 18 purchasing such security from him . . ." 15 U.S.C § 77l(a)(1).

19 Title 15 U.S.C § 77e(a)(1) provides the following:

20 "Unless a registration statement is in effect as to a security, it
 21 shall be unlawful for any person, directly or indirectly—

22 . . .

23 (1) to make use of any means or instruments of transportation
 24 or communication in interstate commerce or of the mails to sell

25 ⁴ Even if Toombs required plaintiff to include allegations negating the statute of repose's
 26 application here, defendants' two-line challenge on this issue fails to explain how
 27 plaintiff's allegations of increased sales activities starting in 2017, Compl. ¶¶ 5, 30-39, 45,
 28 128, does not satisfy such obligation.

25 ⁵ Because the court cannot conclude that the allegations support finding a bona fide
 26 public offer before August 5, 2016, it need not determine whether defendants' sale of
 27 XRP qualified as multiple separate offerings, Dkt. 74 at 12-15, as opposed to a so-called
 28 "slow offer" of the same security over a prolonged period, Dkt. 70 at 19, whether applying
 29 the statute of repose here would be inequitable, Dkt. 74 at 16-17, or whether his
 30 complaint relates back to the Coffey action, id. at 17 n.7.

1 such security through the use or medium of any prospectus or
 2 otherwise;” 15 U.S.C. § 77e.

3 Here, defendants argue that plaintiff failed to state a claim under § 77l(a)(1) on the
 4 following two grounds: (1) he failed to allege that he purchased his XRP as part of an
 5 “initial distribution”; and (2) he failed to allege that defendants qualify as “sellers” within
 6 the meaning of that section. The court analyzes each challenge in turn.

7 **a. Title 15 U.S.C § 77l(a)(1) Does Not Require Plaintiff to Have
 8 Purchased His XRP in an “Initial Distribution”**

9 Here, defendants contend that, to state a claim under § 77l(a)(1), plaintiff must
 10 allege that he purchased his XRP as part of an “initial distribution” of stock, as opposed to
 11 on the “secondary open market.” Dkt. 70 at 20. In support of that contention, defendants
 12 primarily rely upon Gustafson v. Alloyd Co., 513 U.S. 561 (1995).

13 In Gustafson, the Supreme Court interpreted the scope of the term “prospectus” as
 14 used in Title 15 U.S.C. § 77l(a)(2). Gustafson, 513 U.S. at 564 (“Under § 12(2) of the
 15 Securities Act of 1933 buyers have an express cause of action for rescission against
 16 sellers who make material misstatements or omissions ‘by means of a prospectus.’ The
 17 question presented is whether this right of rescission extends to a private, secondary
 18 transaction, on the theory that recitations in the purchase agreement are part of a
 19 ‘prospectus.’”). It held that that term “refer[s] to a document that describes a public
 20 offering of securities by an issuer or controlling shareholder.” Id. at 584. While
 21 Gustafson might suggest that claims under § 77l(a)(2) are limited to misrepresentations
 22 made only in connection with initial distributions of securities, id. at 573 (“[plaintiff
 23 purchaser], as well as Justice THOMAS in his dissent, respond that if Congress had
 24 intended § 12(2) to govern only initial public offerings, it would have been simple for
 25 Congress to have referred to the § 4 exemptions in § 12(2”), such suggestion is unclear
 26 and, in any event, would be limited to the § 77l(a)(2) claims at issue there.

27 In support of their proffered position, defendants further rely upon Gustafson’s
 28 citation to another Supreme Court case, Blue Chip Stamps v. Manor Drug Stores, 421
 29 U.S. 723 (1975). Contrary to defendants’ characterization of that citation, the Supreme

1 Court in Gustafson did not cite Blue Chip Stamps “for [the] proposition that [the]
 2 Securities Act extends **only** to ‘initial distributions of newly issued stock from corporate
 3 issuers.’” Dkt. 75 at 13 (emphasis added). Instead, the Supreme Court in Gustafson
 4 cited Blue Chips Stamps for the following proposition:

5 “The primary innovation of the 1933 Act was the creation of
 6 federal duties—for the most part, registration and disclosure
 7 obligations—in connection with public offerings. See, e.g., . . .
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 752, 95
 8 S.Ct. 1917, 1933, 44 L.Ed.2d 539 (1975) (“The 1933 Act is a
 9 far narrower statute [than the Securities Exchange Act of 1934
 10 (1934 Act)] chiefly concerned with disclosure and fraud in
 connection with offerings of securities—**primarily, as here,**
 initial distributions of newly issued stock from corporate
 issuers.”). Gustafson, 513 U.S. at 571-72 (emphasis added)
 (brackets in the original).

11 Given that “primary” is less restrictive than “only,” defendants’ position—again—
 12 overreaches. As a result, defendants’ reliance upon Gustafson is misplaced.

13 Such mistake is further shown by the text of § 77l(a)(1) and its incorporated
 14 reference to § 77e. Unlike § 77l(a)(2), which applies to certain sale of securities “by
 15 means of prospectus or oral communication,” § 77e(a)(1) prohibits the sale of an
 16 unregistered security “through the use or medium of any prospectus **or otherwise.**” 15
 17 U.S.C. § 77e(a)(1) (emphasis added). Because subsection (a)(1) provides a broader
 18 basis for assigning liability than its subsection (a)(2) counterpart, the court further rejects
 19 defendants’ position and concludes that it may consider a § 77l(a)(1) claim premised
 20 upon a purchase outside the initial distribution context. Given the above, plaintiff’s §
 21 77l(a)(1) claim does not fail for want of purchasing his XRP in an initial distribution.

22 **b. Plaintiff Has Alleged that Defendants Qualify as “Sellers” for**
 23 **Purpose of His Federal Securities Claims**

24 Next, while the parties agree that a “seller” within the meaning of § 77l(a)(1)
 25 extends to a person who either (1) passes title of the security to the buyer or (2) solicits
 26 the purchase with a self-interested financial motive, Dkt. 70 at 22; Dkt. 74 at 18-19 (both
 27 citing Pinter v. Dahl, 486 U.S. 622, 641-42 (1988)), they disagree about such standard’s
 28

1 application to defendants.⁶ With respect to showing seller status under a solicitation
 2 theory, courts acknowledge that “any person who engaged in steps necessary to the
 3 distribution of the unregistered security is liable.” Balestra v. ATBCOIN LLC, 380 F.
 4 Supp. 3d 340, 357-58 (S.D.N.Y. 2019).

5 Here, plaintiff argues that defendants respectively qualify as “sellers” under the
 6 solicitation theory. Significantly, plaintiff alleges that defendants systematically marketed
 7 XRP and financially benefited from such efforts. On the latter point, plaintiff alleges that
 8 from early 2017 to 2018 alone, defendants “have earned over \$1.1 billion through the
 9 sale of XRP.” Compl. ¶ 30. On the former point, plaintiff alleges that defendants
 10 published various tweets, interviews, and articles pushing the adoption of XRP, id. ¶¶ 44,
 11 45, 48-52, hosted conferences concerning XRP’s use, id. ¶ 46, explained on its website
 12 how to purchase XRP and included a link to cryptocurrency exchanges for such
 13 purchases, id. ¶ 43, and even began to lobby Congress and the SEC to adopt
 14 cryptocurrency friendly laws, id. ¶ 54. Such alleged efforts by defendants, if proven, are
 15 more than sufficient to establish their status as sellers under a solicitation theory.
 16 Balestra, 380 F. Supp. 3d at 358 (“These promotional statements trumpeting the potential
 17 of the ATB Coin and the ongoing opportunity to invest in the ATB ICO [initial coin offering]
 18 . . . clearly reflect both [defendants’] efforts to solicit the sale of ATB Coins. . . . I therefore
 19 conclude that the allegations set forth in the Complaint plausibly allege that both
 20 [defendants] engaged in steps necessary to the distribution of the unregistered security . .
 21 .”). Given that, plaintiff alleges sufficient facts that defendants qualify as sellers for
 22

23 ⁶ In their reply, defendants cite a footnote from Pinter stating that “§ 12(1) imposes liability
 24 on only the buyer’s immediate seller; remote purchasers are precluded from bringing
 25 actions against remote sellers. Thus, a buyer cannot recover against his seller’s seller.”
 26 Dkt. 75 at 16 citing Pinter, 486 U.S. at 644 n.21. Defendant failed to explain how this
 27 statement (tucked away in a footnote to a section discussing which sellers may be held
 28 liable for passing title to a security) limits its recognition that a person may separately be
 found liable under a solicitation theory. Id. at 644 (“The [actual purchase of a security]
 requirement, however, does not exclude solicitation from the category of activities that
 may render a person liable when a sale has taken place.”). Without more, the court
 rejects any suggestion that defendants may not be held liable under a solicitation theory
 because they are remote sellers.

1 purpose of plaintiff's § 77l(a)(1) claim. As a result, plaintiff sufficiently alleged his §
 2 77l(a)(1) claims against defendants.

3 **c. Plaintiff Adequately Alleged a Title 15 U.S.C. § 77o Claim
 4 Against Defendant Ripple and Defendant Garlinghouse**

5 Title 15 U.S.C. § 77o provides the following:

6 “Every person who, by or through stock ownership, agency, or
 7 otherwise, or who, pursuant to or in connection with an
 8 agreement or understanding with one or more other persons by
 9 or through stock ownership, agency, or otherwise, controls any
 10 person liable under sections 77k or 77l of this title, shall also be
 11 liable jointly and severally with and to the same extent as such
 controlled person to any person to whom such controlled
 person is liable, unless the controlling person had no
 knowledge of or reasonable ground to believe in the existence
 of the facts by reason of which the liability of the controlled
 person is alleged to exist.” 15 U.S.C. § 77o(a).

12 “To establish a prima facie case of control-person liability, a plaintiff must prove a
 13 primary violation of the federal securities laws, and that the defendant exercised actual
 14 power or control over the primary violator.” In re Harmonic, Inc., Sec. Litig., 2006 WL
 15 3591148, at *5 (N.D. Cal. Dec. 11, 2006). “Control means the ‘possession, direct or
 16 indirect, of the power to direct or cause the direction of the management and policies of a
 17 person, whether through the ownership of voting securities, by contract, or otherwise.’”
Maine State Ret. Sys. v. Countrywide Fin. Corp., 2011 WL 4389689, at *12 (C.D. Cal.
 18 May 5, 2011).

19 Here, plaintiff alleges that defendant Ripple and defendant Garlinghouse “directly
 20 or indirectly controlled the primary violator,” defendant XRP II. Compl. ¶¶ 14-16, 177-83.
 21 Defendants do not dispute that such allegations suffice to establish control person liability
 22 under § 77o. Dkt. 70 at 24-25 (focusing their single paragraph analysis on defendant
 23 Garlinghouse’s control person liability on only plaintiff’s purported failure to state a
 24 primary violation); Dkt. 75 at 16 (contending only that plaintiff does not dispute that the
 25 statute of repose equally applies to this claim as well, and that “this claim is derivative of
 26 and dependent on his Section 12(a)(1) claim.”). Because plaintiff has stated an
 27 actionable claim for a primary violation of §77l(a)(1) and defendants failed to challenge
 28

1 the viability of plaintiff's allegations that defendant Garlinghouse controlled such
2 defendants, the court concludes that plaintiff adequately alleged his § 77o claims against
3 defendant Ripple and defendant Garlinghouse.

4 **3. Plaintiff Adequately Alleged Unqualified Securities Claims under
5 California Corporations Code §§ 25110, 25503, and 25504**

6 **a. Plaintiff Alleged a Claim under California Corporations Code §
7 25503 for Violation of § 25110's Qualified Securities
8 Requirement**

9 “Among other things, the [California Securities Law of 1968] Act prohibits the sale
10 of securities in an issuer transaction unless the sale has been ‘qualified’ in accordance
11 with statutory requirements.” Apollo Capital Fund, LLC v. Roth Capital Partners, LLC,
12 158 Cal. App. 4th 226, 249 (2007) (citing California Corporations Code § 25110). § 25110
13 makes it “unlawful for any person to offer or sell in this state any security in an issuer
14 transaction . . . whether or not by or through underwriters,” unless such sale satisfies
15 certain qualifications (which defendants here do not contest). Cal. Corp. Code § 25110.

16 California Corporations Code § 25503 further provides the following:

17 “[a]ny person who violates Section 25110 . . . shall be liable to
18 any person acquiring from him the security sold in violation of
19 such section, who may sue to recover the consideration he paid
20 for such security with interest thereon at the legal rate . . . or for
damages, if he no longer owns the security, or if the
consideration given for the security is not capable of being
returned.” Cal. Corp. Code § 25503.

21 Here, defendants argue that plaintiff failed to state a claim for violation of § 25110
22 on the following three grounds: (1) he failed to allege that he purchased his XRP as part
23 of an “issuer transaction”; (2) he failed to allege that he purchased his XRP from
24 defendants, in satisfaction of § 25503’s purported privity requirement; and (3) he failed to
25 allege that defendants offered or sold XRP in California. The court analyzes each in turn.

26
27
28

- i. Plaintiff Has Adequately Alleged an “Issuer Transaction” for Purpose of His California Corporations Code § 25503 Claim

Here, defendants argue that § 25110 requires that plaintiff purchase the subject security from defendants directly as part of an “issuer transaction,” which, they contend, “are sales of securities purchased from the issuing corporation in a public offering.” Dkt. 70 at 25. In support of their position, defendants primarily rely upon Mirkin v. Wasserman, 5 Cal. 4th 1082, 1104 (1993) and California Corporation Code § 25011.

In Mirkin, the California Supreme Court implied a distinction between an “issuer transaction” under § 25110 and certain “aftermarket transactions,” which it generally defined as “resales of securities after they have been purchased from the issuing corporation in a public offering.” Mirkin, 5 Cal. 4th at 1104. Although the California Supreme Court subsequently characterized its discussion in Mirkin about the California Corporation Code as dicta,⁷ the court in Mirkin noted that § 25110 is limited to the sale of unqualified securities made as part of an “issuer transaction.” Mirkin, 5 Cal. 4th at 1104 (citing § 25110 for the proposition that “the Legislature knew how to write a statute that addressed ***only issuer transactions*** when that was what it intended to do.”) (emphasis added). Based on Mirkin’s dicta, then, defendants are correct that, to state a claim under § 25110, a plaintiff must have purchased his security as part of an “issuer transaction.”

However, the question remains whether plaintiff's alleged subsequent purchases on an exchange that defendants sold to nonetheless qualifies as an "issuer transaction" for purpose of stating a claim for violation of § 25011. Significantly, § 25011 provides the following in its entirety:

“Nonissuer transaction” means any transaction not directly or indirectly for the benefit of the issuer. A transaction is indirectly

⁷ Diamond Multimedia Sys., Inc. v. Superior Court, 19 Cal. 4th 1036, 1044–45 (1999) (“Mirkin is not dispositive, however, as the quoted statement was dictum and was not made with reference to the place at which a section 25500 plaintiff bought or sold stock. . . Liability under [California Corp. Code] sections 25400 and 25500 was not in issue.”).

for the benefit of the issuer if any portion of the purchase price of any securities involved in the transaction will be received indirectly by the issuer. *An offering which involves both an issuer transaction and a nonissuer transaction shall be treated for the purposes of Chapters 2 (commencing with Section 25110) and 4 (commencing with Section 25130) of Part 2 of this division as an issuer transaction*, but for the purposes of Chapter 1 (commencing with Section 25100) of Part 2 of this division they shall be treated as separate transactions.” Cal. Corp. Code § 25011 (emphasis added).

Plaintiff’s § 25503 claim arises under § 25110, which is codified at California Corporations Code Chapter 2, Part 2 of Division 1. As a result, § 25011 definition of “issuer transaction” applies. Defendants do not contest that their decision to initially list XRP on an exchange would qualify as an offering that, under their own proffered definition of an issuer transaction (Dkt. 70 at 25), gives rise to a qualifying transaction. Plainly, the purpose of listing XRP on an exchange is for market participants (like plaintiff) to then purchase such XRP. Absent such subsequent purchases, defendants’ listings would fail. Whether such subsequent purchases qualify as an “issuer transaction” (under defendants’ proffered definition) or instead fall outside that definition as “nonissuer” transactions is therefore beside the point here: because defendants’ XRP exchange listings depended upon subsequent third-party purchases, it necessarily “involved” such transactions. As a result, any purchase of XRP by plaintiff on an exchange qualifies as an issuer transaction under § 25011 and, therefore, for purpose of his § 25503 claim.

ii. Plaintiff Adequately Alleged Privity with Defendants

Next, defendants contend that § 25110 includes a privity requirement and that plaintiff failed to allege facts satisfying such requirement. While the court agrees that, to state a claim under § 25503 for violation of § 25110, plaintiff must allege privity with defendants, the court concludes that plaintiff satisfied that requirement.

California Corporations Code § 25503 provides the following in relevant part:

“Any person who violates Section 25110 . . . shall be liable to any person acquiring from him the security sold in violation of such section . . .” Cal. Corp. Code § 25503 (emphasis added).

To support their interpretation of this section, defendants primarily rely upon Bowden v. Robinson, 67 Cal. App. 3d 705 (1977). The court in Bowden interpreted §

1 25503 and § 25110 to “create liability affording the ***immediate purchaser*** several
 2 specific remedies.” 67 Cal. App. 3d at 712 (emphasis added). The court in Bowden
 3 explained that “[t]he Legislature, in section 25503, by the words ‘any person acquiring
 4 from him’ has required privity, with some exceptions, as a condition of recovery.” Id.

5 To support his competing interpretation, plaintiff primarily relies upon Moss v.
 6 Kroner, 197 Cal. App. 4th 860 (2011), which, according to plaintiff, stands for the
 7 proposition that whether privity is required depends upon which remedy is available
 8 against the primary violator of the statute. Dkt. 74 at 24. Contrary to plaintiff’s
 9 suggestion, the court in Moss did not consider the privity requirement for primary liability
 10 claims pursuant to § 25503. Instead, the court in Moss considered whether California
 11 Corporation Code’s ***secondary liability*** sections (§ 25504 and § 25504.1) required privity
 12 between plaintiff and secondary violators. Moss, 197 Cal. App. 4th at 871-72. While the
 13 court in Moss recognized that privity is not required to recover damages against a
 14 defendant on a secondary liability theory under § 25504 and § 25504.1, it acknowledged
 15 that, to state a primary violation claim under § 25503, plaintiff must show privity with the
 16 primary violator. Moss, 197 Cal. App. 4th at 878 (“While we agree . . . that ordinary
 17 principles of rescission require strict privity in order to rescind contracts . . . we conclude
 18 that the Legislature, when it enacted sections 25504 and 25504.1, intended to depart
 19 from those principles by placing these certain secondary actors in the shoes of the
 20 principal violator for the purpose of civil liability ***as long as the original direct violator***
 21 ***was in privity with the plaintiff.***”) (emphasis added).

22 Plaintiff’s remaining authority (Openwave Systems, Inc. v. Fuld, 2009 WL 1622164
 23 (N.D. Cal. June 6, 2009)) similarly does not consider privity in the context of primary
 24 liability claims brought under § 25503. Id. at *5-9. Based on Bowden, the court concludes
 25 that plaintiff must allege privity to state a claim under § 25503.

26 The court finds that plaintiff plausibly alleged that he purchased his XRP from
 27 defendants for purpose of stating a primary violation claim under § 25503. As an initial
 28 matter, plaintiff alleges that he, along with members of the putative class, “purchased

1 XRP securities from defendants.” Compl. ¶¶ 172, 187. While the court recognizes that
 2 the above allegations do not specify a direct purchase, they also do not foreclose any
 3 inference of such purchase. Significantly, as plaintiff pointed out at oral arguments its
 4 129,000 XRP unit purchase during 2018 Q1, when compared to defendants sale of 0.095
 5 percent of the XRP traded on the market that quarter, supports the inference that plaintiff
 6 purchased approximately 122 XRP units from defendant (or approximately 19 XRP units,
 7 discounting for plaintiff’s two week trading period and reasonably assuming uniform
 8 distribution of sale by defendant during that period).

9 This conclusion is further supported by the more glaring (but largely unaddressed)
 10 issue presented by this claim—namely, to what extent may defendants be considered in
 11 privity with an exchange purchaser when a subsequent purchase qualifies as part of an
 12 issuer transaction under § 25011. In any event, at this stage in the litigation, where the
 13 court may draw reasonable inferences and the relationship between defendants,
 14 subsequent purchasers, and the exchange is unclear, the court concludes that plaintiff
 15 has adequately alleged privity in support of his § 25503 claim, though he may ultimately
 16 be unable to prove it.

17 **iii. Plaintiff Adequately Alleged that Defendants Offered the
 18 Subject Securities in California**

19 To state a claim premised upon a violation of § 25110, a plaintiff must allege that
 20 the subject securities were offered or sold in California. Diamond Multimedia Sys., Inc.,
 21 19 Cal. 4th at 1053. California Corporations Code § 25008(a) provides that an offer or
 22 sale of a security is made in California under any of the following conditions:

- 23 • When an offer to sell is made in this state;
- 24 • When an offer to buy is accepted in this state; or
- 25 • If both the seller and purchaser are domiciled in this state, the security is
 delivered to the purchaser in this state. Cal. Corp. Code § 25008(a).

27 The California Supreme Court has acknowledged that an advertisement may
 28 qualify as an offer if it “invite[s] the performance of a specific act without further

communication and leave nothing for negotiation.” *Donovan v. RRL Corp.*, 26 Cal. 4th 261, 271 (2001), as modified (Sept. 12, 2001).

Here, plaintiff adequately alleged that defendants offered to sell XRP in California. Significantly, plaintiff alleges that defendant Ripple “has an entire section of its website dedicated to providing advice on ‘How to Buy XRP,’” and that such section “provides links to exchanges and instructions on ‘how to buy XRP’ on those exchanges,” Compl. ¶¶ 43, 135. The court concludes that this information qualifies as an offer via advertisement because the link invites the performance of a specific act (the purchase of XRP on an exchange) without any further communication (because the guide explains how to complete the purchase). Given the nature of exchanges, the court may reasonably infer that the conversion rate (e.g., USD to XRP) is set by the market and therefore not subject to particularized negotiation. Such inference is further supported by the “fungible” (i.e., interchangeable or non-unique) nature of each XRP unit exchanged. Further, because defendant Ripple allegedly posted the guide and hyperlink on its website, the court may reasonably infer that such materials were accessible to individuals in this state. As a result, plaintiff has adequately alleged that defendants offered the subject unregistered securities “in this state” for purpose of his § 25503 claim.⁸

b. Plaintiff Adequately Alleged California Corporate Code § 25504
Control Person Liability Claims against Defendant Ripple and
Defendant Garlinghouse for Violation of § 25110

California Corporations Code § 25504 provides the following:

“Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the

⁸ Defendants also fail to provide any authority interpreting Code § 25110's "in this state" requirement to apply to only an offer or sale of a security purchased *by plaintiff* (as opposed to similar such securities sold/offered to other third parties in California more generally). Given that failure, defendants' suggestion that such requirement applies, Dkt. 70 at 26, does not alter this conclusion.

1 violation, and every broker-dealer or agent who materially aids
 2 in the act or transaction constituting the violation, are also liable
 3 jointly and severally with and to the same extent as such
 4 person, unless the other person who is so liable had no
 knowledge of or reasonable grounds to believe in the existence
 of the facts by reason of which the liability is alleged to exist.”
 Cal. Corp. Code § 25504.

5 This section “imposes ‘control person’ liability on those who assist others in
 6 primary violations under the California Securities Act.” Jackson v. Fischer, 931 F. Supp.
 7 2d 1049, 1064 (N.D. Cal. 2013). “[I]n the absence of a viable claim of primary liability,
 8 plaintiff cannot state a claim against the D & O defendants for control person liability
 9 under § 25504.” Id. at 1064.

10 Here, defendants contend only that “[b]ecause Plaintiff’s unqualified securities
 11 claim fails, his control person liability claim also fails.” Dkt. 70 at 27. Defendants do not
 12 contest that plaintiff’s allegations that defendant Ripple and defendant Garlinghouse
 13 “directly or indirectly controlled the primary violator” defendant XRP II, Compl. ¶¶ 14-16,
 14 177-83, suffice to establish control person liability. As analyzed above, plaintiff alleged a
 15 primary liability claim under § 25503 for violation of § 25110. As a result, plaintiff has
 16 alleged control person liability claims under § 25504 against defendant Ripple and
 17 defendant Garlinghouse for violation of § 25110.

18 **4. Plaintiff Failed to Allege Misrepresentation Claims Against Defendants**
 19 **under California Corporations Code §§ 25401, 25501, and 25504.1**
 20 **a. Plaintiff Failed to Allege a California Corporations Code § 25501**
 21 **Claim for Violation of § 25401**

22 California Corporations Code § 25401 makes it “unlawful for any person to offer or
 23 sell a security in this state, or to buy or offer to buy a security in this state, by means of
 24 any written or oral communication that includes an untrue statement of a material fact or
 25 omits to state a material fact necessary to make the statements made, in the light of the
 26 circumstances under which the statements were made, not misleading.” Cal. Corp. §
 27 25401. In relevant part, California Corporations Code § 25501 provides the following:

28 “Any person who violates Section 25401 shall be liable to the

person who purchases a security from him or sells a security to him . . . unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission." Cal. Corp. Code § 25501.

Here, defendants argue that plaintiff failed to state a claim for violation of California Corporations Code § 25401 on the following four grounds: (1) he failed to allege that he purchased his XRP from defendants directly, in satisfaction of § 25501's purported privity requirement; (2) he failed to allege that defendants offered or sold XRP in California; (3) he failed to allege that the misstatements complained of were directed at plaintiff; and (4) he failed to allege any misstatement by defendants with the requisite specificity.

Because the court has already disposed of defendants first and second challenges in its analysis above concerning the viability of plaintiff's § 25503 claim, the court analyzes only defendants' third and fourth challenges.

- i. California Corporations Code § 25401 Does Not Require that a Defendant Direct Its Purported Misstatement to Plaintiff to Be Actionable

In support of their position, defendants primarily rely upon SIC Metals, Inc. v. Hyundai Steel Co., 2018 WL 6842958 (C.D. Cal. Nov. 14, 2018), which, they claim, “rejected a Section 25401 claim where the plaintiffs ‘failed to allege any facts that indicate [defendant] made a false or misleading statement to Plaintiffs when negotiating the purchase of . . . stock’ from them.” Dkt. 75 at 18. The court in SIC Metals, Inc. offers no reasoning in support of limiting actionable statements to those made expressly to a plaintiff in his or her particular purchase of securities. 2018 WL 6842958 at *5.

In support of their position to the contrary, plaintiff primarily relies upon Mausner v. Marketbyte LLC, 2013 WL 12073832, at *10 (S.D. Cal. Jan. 4, 2013), for the proposition that “[t]o adequately plead that Defendants’ misrepresentations and omissions were made ‘in connection with the purchase or sale of a security,’ Plaintiff must plead facts demonstrating that the statements or omissions ‘coincided’ with the purchase or sale.” Dkt. 74 at 27. This proposition is uncontroversial and does not address the critical issue

of whether the challenged statement must target plaintiff specifically.

In the absence of any controlling circuit authority, the court concludes that § 25401 does not require that a defendant direct the alleged misstatement to the complaining plaintiff. The text of that section does not include any such requirement. Indeed, when construing that section, the court in Apollo Capital read-in the phrase “in connection with the purchase or sale of securities” without any citation or reason in support. 158 Cal. App. at 249. Absent justification, the court refuses to further tighten the requirements to state a claim under that section. As a result, plaintiff’s § 25501 and § 25504.1 claims survive defendants’ third challenge.

ii. Plaintiff Failed to Adequately Allege an Actionable Misstatement under Rule 9(b)

As a preliminary matter, plaintiff suggests that Rule 9(b) does not necessarily apply to his claims for violation of § 25401 because they might sound in negligence (as opposed to fraud). Dkt. 74 at 27. Plaintiff fails to develop that potential distinction. In any event, because Rule 9(b) applies to negligent misrepresentation claims,⁹ plaintiff's underdeveloped suggestion to the contrary is misplaced. As a result, the court applies Rule 9(b) to plaintiff's § 25501 and § 25504.1 claims for violation of § 25401.

Here, plaintiff failed to satisfy Rule 9(b)'s heightened pleading standards with respect to defendants' allegedly fraudulent misstatements. To satisfy such showing, plaintiff relies upon the following sets of allegations. The court analyzes each below.

First – “Ripple claims that XRP has utility—like currency—in its use as a ‘bridge currency’ for international payments. But, as discussed above, more than 60 percent of XRP is owned by Ripple and none of that XRP is used for anything at all, other than to be sold in the future to investors. Moreover, as for the XRP that was already sold or otherwise distributed by Defendants, the vast majority of it is not used for bridging

⁹ *Atl. Richfield Co. v. Ramirez*, 176 F.3d 481 (9th Cir. 1999) (“The district court also properly dismissed [defendant counter-claimant’s] first and second counterclaims, for fraud **and negligent misrepresentation respectively**, because they did not comply with Federal Rule of Civil Procedure 9(b)’s particularity requirement.”) (emphasis added).

1 international transactions, but for investment purpose. Accordingly, Defendants' claim
2 that XRP has a utilitarian purpose is nothing but a red herring attempt to avoid the
3 application of securities laws." Compl. ¶ 41.

4 Here, plaintiff fails to specify (1) who among defendants' employees made the
5 statement, (2) when it was made, (3) where it was made, and (4) how it was
6 communicated. As a result, the misstatement alleged above fails Rule 9(b).

7 **Second** – "Similarly, on or about December 21, 2017, Ripple tweeted in Japanese
8 that XRP was now available on over 50 exchanges. That tweet linked to an article on
9 Ripple's website which described XRP as 'the fastest and most scalable [digital] asset on
10 the market.' It continued, '[t]he market is taking notice of XRP's speed, reliability and
11 scalability — which has strengthened the demand for XRP and where it's listed. In fact,
12 we're proud to announce that XRP has gone from being listed on six exchanges earlier
13 this year to more than 50 worldwide.' The article also linked to a number of exchanges
14 where XRP could be purchased, and stated that 'XRP's long-term value is determined by
15 its utility—including its ability to help financial institutions source liquidity for payments
16 into and out of emerging markets.'" Id. ¶ 45.

17 Here, plaintiff fails to explain how or why the above statement is false. As a result,
18 the misstatement alleged above fails Rule 9(b).

19 **Third** – "Ripple's CEO, Brad Garlinghouse, has also been a vocal advocate for
20 investing in XRP. In a December 14, 2017 interview with BNN, when asked if he is
21 personally invested in XRP, the CEO stated 'I'm long XRP, I'm very, very long XRP as a
22 percentage of my personal balance sheet.' He continued, stating that he is 'not long on
23 some of the other [digital] assets, because it is not clear to me what's the real utility, what
24 problem are they really solving.' He ended by reiterating, 'if you're solving a real problem,
25 if it's a scaled problem, then I think you have a huge opportunity to continue to grow that.
26 We have been really fortunate obviously, **I remain very, very, very long XRP**, there is
27 an expression in the industry HODL, instead of hold, it's HODL . . . I'm on the HODL
28 side.'" (emphasis in the original). Id. ¶ 49.

1 Here, plaintiff fails to explain how or why the above statement is false. As a result,
2 the misstatement alleged above fails Rule 9(b).

3 **Fourth** – “52. On or about January 17, 2018, Garlinghouse tweeted a CNBC
4 article titled, “*Ripple is sitting on close to \$80 billion and could cash out hundreds of*
5 *millions per month – but it isn’t*,” with the caption, “A good read on why fostering a healthy
6 \$XRP ecosystem is a top priority at @Ripple.” . . . 53. However, the reality was that
7 Ripple was doing exactly the opposite of what CNBC reported. As laid out in Section
8 IV(B), Defendants issued and sold at least \$167.7 million worth of XRP between January
9 1, 2018 and March 31, 2018.” Id. ¶¶ 52-53.

10 Here, plaintiff fails to explain how or why the alleged caption and accompanying
11 statements tweeted by defendant Garlinghouse are false. Plaintiff’s allegation that
12 “defendants issued and sold at least \$167.7 million worth of XRP” during 2018 Q1 is not
13 necessarily inconsistent with (1) cashing-out ***hundreds of millions per month*** (\$167
14 million quarterly divided by three months equals appx. \$56 million per month) or (2)
15 fostering a healthy XRP ecosystem. Relatedly, paragraph 53’s cross-reference to
16 Section IV(B) does not alter that conclusion. Significantly, that section, at paragraph 36,
17 merely provides the figures for the \$167.7 million in alleged sales during 2018 Q1.
18 Compl. ¶ 36. As a result, the misstatement alleged above fails Rule 9(b).

19 **Fifth** – “On April 26, 2017, Ripple tweeted a link to an article on its own site,
20 proclaiming: ‘#Ripple welcomes 10 additional customers to our #blockchain #payments
21 network.’ Neither this tweet nor the article it linked to informed readers that the blockchain
22 payments network did not refer to the XRP Ledger, but rather Ripple’s xCurrent
23 enterprise solution.” Id. ¶ 62.

24 Here, plaintiff fails to explain how or why defendants’ purported failure to specify
25 that the referenced network related to the enterprise solution creates an improper
26 impression that such solution is the same as XRP. Defendants raise this exact argument
27 in their motion, Dkt. 70 at 30, and plaintiff offers no response, Dkt. 74 at 27-28. As a
28 result, the misstatement alleged above fails Rule 9(b).

1 **Sixth** – Various statements (mostly tweets) by defendants on specified dates
 2 concerning public interest in XRP (Compl. ¶ 63), advantages over Bitcoin (*id.* ¶ 64), the
 3 growth and potential value of XRP (*id.* ¶¶ 65-66), the future use of XRP by American
 4 Express, the Japan Bank Consortium, as well as other “banks and payment providers”
 5 (*id.* ¶¶ 67, 68, 73), how XRP is more than “bank software” (*id.* ¶ 74), a partnership with
 6 MoneyGram (*id.* ¶¶ 102-103), defendants’ intent to develop the infrastructure necessary
 7 for banks to directly use XRP (*id.* ¶ 102), and how XRP’s value depends upon the XRP
 8 Ledger’s use for cross-border payments as well as its adoption by enterprises (*id.* ¶ 149).

9 Again, plaintiff fails to explain how or why any of the misstatements alleged in the
 10 above paragraphs are false. In their motion, defendants challenged the sufficiency of
 11 various of these alleged misstatements. Dkt. 70 at 31. Plaintiff failed to respond to such
 12 challenges. Dkt. 74 at 27-28. As a result, the misstatements alleged at paragraphs 63-
 13 68, 70, 73-74, 102-03, and 149 all fail Rule 9(b).

14 **Seventh** – “95. Defendants made numerous statements to the public falsely
 15 claiming XRP is not a security to prop up demand and its value. . . . 96. For example, on
 16 approximately April 11, 2018, Ripple’s Chief Market Strategist, Cory Johnson, told CNBC:
 17 ‘We absolutely are not a security. We don’t meet the standards for what a security is
 18 based on the history of court law.’ Mr. Johnson also said, ‘Coinbase never ever raised the
 19 issue of whether or not XRP is a security in our discussions about listing XRP. We’re 100
 20 percent clear, it’s not a security. We don’t meet the standards.’ . . . 97. Ripple’s CEO
 21 Garlinghouse made similar comments, claiming XRP is not a security, to the public
 22 through a variety of avenues and media channels, including at the CB Insights Future of
 23 Fintech, live-streamed by Yahoo Finance.” *Id.* ¶¶ 95-97.

24 Here, a statement that XRP does not qualify as a “security” is a position on a legal
 25 question, ***not*** an actionable misstatement. Indeed, the rest of the statement alleged at
 26 paragraph 96 (“We don’t meet the standards for what a security is based on the history of
 27 court law”) further clarifies the basis for such stated opinion. The alleged misstatement
 28 by defendant Garlinghouse at paragraph 97 separately fails Rule 9(b)’s what, when, why,

and how requirements. Significantly, such allegation also fails to specify the exact claims made by defendant Garlinghouse concerning XRP's status as a non-security. As a result, the misstatements alleged at paragraph 96-97 fail Rule 9(b).

In addition to shortcomings detailed above, plaintiff also fails to identify the respective involvement of each defendant in the alleged fraud. Compl. ¶ 198 (“Defendants, ***separately or together***, had knowledge of the falsity or misleading nature of a statement or omission made in connection with the offers or sales of XRP. Alternatively, Defendants, ***separately or together***, were negligent in failing to investigate and discover the falsity of the statement or omission.”) (emphasis added). Such a failure to differentiate which allegations of fraud apply to which defendants is separately improper under Rule 9(b). Swartz, 476 F.3d at 764-65.

Lastly, to the extent plaintiff bases his § 25501 upon any purported misstatement not analyzed above, Dkt. 74 at 27 (characterizing the seven sets of allegations analyzed above as “examples” of the misstatements alleged), such claim fails Rule 9(b) because plaintiff did not expressly identify such misstatements as the basis for this claim in his complaint or opposition.

b. Plaintiff Failed to State a California Corporations Code § 25504.1
Claim Against Defendant Ripple Labs and Defendant
Garlinghouse

California Corporate Code § 25504.1 provides the following in relevant part:

"Any person who materially assists in any violation of Section 25110 . . . or 25401 . . . with intent to deceive or defraud, is jointly and severally liable with any other person liable under this chapter for such violation." Cal. Corp. Code § 25504.1.

Here, plaintiff has failed to allege a predicate violation of § 25401. Absent such showing, plaintiff cannot allege joint and several liability under § 25504.1 against defendant Ripple or defendant Garlinghouse. SIC Metals, Inc., 2018 WL 6842958, at *5 (“Plaintiffs nevertheless fail to sufficiently allege joint and several liability here. First . . . Plaintiffs have failed to state an underlying violation of section 25401.”).

1 **5. Plaintiff Failed to State Claims under California's Consumer Protection
2 Statutes**

3 California Business & Professions Code § 17200 "prohibits business acts that are
4 (1) fraudulent, (2) unfair, or (3) unlawful." Siegal v. Gamble, 2016 WL 1085787, at *7
5 (N.D. Cal. Mar. 21, 2016). California Business & Professions Code § 17500 makes it
6 "unlawful for any company or employee thereof to make or disseminate any statement
7 concerning real or personal property or professional services, which is known, or which
8 by the exercise of reasonable care should be known, to be untrue or misleading." Castro
9 Valley Union 76, Inc. v. Vapor Sys. Techs., Inc., 2012 WL 5199458, at *9 (N.D. Cal. Oct.
10 22, 2012).

11 Here, defendants argue that plaintiff failed to state claims under § 17200 and §
12 17500 on the following three grounds: (1) California's consumer protection statutes do
13 not apply to claims alleging securities-related violations; (2) those statutes include a
14 legislative safe harbor, which applies here given that plaintiff's federal securities claims
15 are barred by Title 15 U.S.C. § 77m's statute of repose; and (3) plaintiff failed to allege
16 statements or conduct in support of these claims with the requisite Rule 9(b) specificity.
17 Because the court has already found that the statute of repose does not bar plaintiff's
18 federal securities claims, the court analyzes only defendants first and third challenges.

19 **a. California Business and Professions Code § 17200 and § 17500
20 Do Not Apply to Securities-Related Violations**

21 Defendants are correct that § 17200 and § 17500 do not extend to actions that
22 relate to securities transactions. In support of that position, defendants primarily rely
23 upon Bowen v. Ziasun Techs., Inc., 116 Cal. App. 4th 777 (2004), as modified on denial
24 of reh'g (Apr. 7, 2004).

25 In Bowen, the court ruled that "Section 17200 does not apply to securities
26 transactions." Id. at 788. In support of its adoption of that rule, the Bowen court looked
27 to the reasoning proffered by the Ninth Circuit in Spinner Corp. v. Princeville Dev. Corp.,
28 849 F.2d 388 (9th Cir. 1988), Bowen, 116 Cal.App.4th at 788, which interpreted a Hawaii

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1 consumer-protection statute similar to § 17200 not to extend to actions involving
 2 securities, Spinner Corp., 849 F.2d at 392-93. The Bowen court found that the legislative
 3 intent of § 17200 was no different than that of the Hawaii statute at issue in Spinner,
 4 Bowen, 116 Cal. App. 4th at 788, and reasoned that, because California courts treat
 5 federal court decisions interpreting federal counterpart statutes as extraordinarily
 6 persuasive, and “the FTC has never applied the FTC Act to securities transactions,” §
 7 17200 “should also not reach [securities] transactions,” id. at 788-89.

8 In response, plaintiff primarily relies upon Overstock.com, Inc. v. Gradient
 9 Analytics, Inc., 151 Cal. App. 4th 688 (2007). While plaintiff is correct that the court in
 10 Overstock limited Bowen, it expressly recognized the ongoing validity of Bowen’s ruling
 11 that § 17200 does not extend to securities transactions. 151 Cal. App. 4th at 715
 12 (“Whether one agrees with Bowen or not ***its holding that securities transactions are***
 13 ***not covered under the UCL bars lawsuits based on deceptive conduct in the sale***
 14 ***and purchase of securities, nothing more.*** Overstock’s claims do not arise from any
 15 stock transactions between the parties. Rather, they arise from the allegedly defamatory
 16 reports . . .”) (italics in the original) (bold italics added) (footnote omitted).

17 Various courts in this district have commented on the reasoning and reach of
 18 Bowen’s rule,¹⁰ however, the only potential criticism of Bowen by the California Supreme
 19 Court—itself contained in a footnote—states only that: “Whatever the scope and merits of
 20 that holding may be . . . it does not apply here.” Rose v. Bank of America, 57 Cal. 4th
 21 390, 399 n.8 (Cal. 2013). Whatever its merits, then, Bowen remains California law.

22 As a result, the court concludes that Bowen bars plaintiff’s § 17200 claim to the
 23 extent plaintiff premises that claim on the theory that XRP is a security. Further, because

25 ¹⁰ Siegal v. Gamble, 2016 WL 1085787, at *7-8 (N.D. Cal. Mar. 21, 2016) (citing In re
 26 Charles Schwab Corp. Secs. Litig., 257 F.R.D. 534 (N.D. Cal. 2009) and Strigliabotti v.
 27 Franklin Resources, Inc., 2005 WL 645529 (N.D. Cal. Mar. 7, 2005) in support of the
 28 proposition that courts have “narrowly limited” Bowen to securities transactions and
 “questioned the validity of its conclusion,” but ultimately acknowledging that “[t]he fact
 remains, however, that California courts, not a federal court interpreting California law,
 must decide whether to overturn Bowen’s holding. Until that day, Bowen endures.”).

1 plaintiff's § 17500 is based on the same securities-related allegations supporting its §
 2 17200 counterpart, the court concludes that Bowen likewise bars that claim.

3 **b. Plaintiff's Business and Professions Code § 17200 and § 17500**
 4 **Claims Also Fail Rule 9(b)'s Heightened Pleading Requirements**

5 Here, plaintiff does not dispute that Rule 9(b)'s heightened pleading standard
 6 generally applies to § 17200 and § 17500 claims in federal court. Dkt. 74 at 32. In
 7 plaintiff's three-paragraph opposition to defendants' challenge that his § 17200 and §
 8 17500 claims fail Rule 9(b), plaintiff relies solely upon the same seven categories of
 9 purported misstatements that he identified in support of his misrepresentation claims
 10 under California Corporations Code § 25401 and § 25504. Dkt. 74 at 32. As decided
 11 above, such alleged misstatements fail Rule 9(b)'s heightened pleading requirements.
 12 As a result, plaintiff's § 17200 and § 17500 claims similarly fail those requirements.¹¹

13 As previously stated, the court concludes that Bowen bars plaintiff's § 17200 and §
 14 17500 claims to the extent such claims depend upon XRP's factual status as a security.
 15 However, the statements that plaintiff's § 17200 and § 17500 claims rely upon do not,
 16 themselves, require a finding of such status to be actionably misleading. Identified in his
 17 opposition brief, such statements instead reflect efforts at publicizing XRP's usefulness
 18 and scope of adoption, as well as defendants' XRP sales activities. Dkt. 74 at 27-28
 19 (bullets one through six). In the event XRP were factually determined **not** to be a
 20 security (like any other non-security good subject to California consumer protection
 21 statutes) and plaintiff alleged the above referenced misstatements with requisite Rule
 22 9(b) specificity, those statements may still be actionable under § 17200 or § 17500 under,
 23 for example, a theory of false advertising. As a result, the court allows plaintiff leave to

24
 25 ¹¹ Although plaintiff argues that defendants' alleged misstatements "are the crux of [his]
 26 FAL and UCL claims," Dkt. 74 at 32, plaintiff also alleges that their "acts and practices"
 27 violated § 17200 by offending "established public policy," Compl. ¶ 218. Plaintiff fails to
 28 allege the established public policy offended in both his complaint and opposition. As a
 result, to the extent plaintiff bases his § 17200 claim upon a theory of conduct distinct
 from the purported misrepresentations rejected on Rule 9(b) grounds above, the court
 concludes that such alternative theory does not salvage his § 17200 claim.

1 amend his § 17200 and § 17500 claims to satisfy Rule 9(b) but **only** both under the
2 alternative theory that XRP is not a security and with respect to the above referenced
3 misstatements identified in plaintiff's opposition brief.

4 **CONCLUSION**

5 For the above reasons, the court grants in part and denies in part defendants'
6 motion to dismiss. The motion to dismiss the first and second causes of action for
7 violation of Title 15 U.S.C. § 77l(a)(1) and § 77o is **DENIED**. The motion to dismiss the
8 third and fifth causes of action for violation of California Corporations Code § 25503, §
9 25504, and § 25110 is **DENIED**. The motion to dismiss the fourth cause of action for
10 violation of California Corporations Code § 25501, § 25504.1, and § 25401 is **GRANTED**
11 with leave to amend. The motion to dismiss the sixth and seventh causes of action for
12 violations of California Business and Professions Code § 17200 and § 17500 is
13 **GRANTED** with prejudice, except as narrowly provided immediately above.

14 The court allows plaintiff **28 days** from the date of this order to file an amended
15 consolidated complaint accounting for the deficiencies in the claims dismissed without
16 prejudice. In it, plaintiff must specifically set forth any alleged misrepresentation used to
17 support any amended claim. Failure to do so will result in dismissal of such claim with
18 prejudice. Plaintiff may not otherwise amend his complaint absent leave of court or
19 consent of defendants. Upon the filing of any amended complaint, plaintiff must also file
20 a redline clearly demarcating its changes from the existing complaint.

21 **IT IS SO ORDERED.**

22 Dated: February 26, 2020

23 /s/ Phyllis J. Hamilton

24 PHYLLIS J. HAMILTON
United States District Judge

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